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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 666

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. ____

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 20, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported in 195 F. Supp. 793.[1] The Court of Appeals' opinion (R. 24-29), Appendix A, *infra*, pages 13-20, is reported in 307 F.2d 941.

[1] The District Court's opinion appears in the "Transcript of Record" (R. 1-21). Nine other copies of said transcript are filed herein.

JURISDICTION

The judgment of the Court of Appeals (R. 30), Appendix B, *infra,* page 21, was entered September 20, 1962.

Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the United States liable to the State of California under the Tort Claims Act for the costs of suppressing a fire negligently caused by its employees, in the absence of physical injury by the fire to property owned by the State where the law of California does not require such injury for recovery of suppression costs against private individuals?

STATUTES INVOLVED

Federal Statutes

28 U.S.C. §§1346(b) and 2674 of the Federal Tort Claims Act. These and other pertinent federal statutes cited are printed in Appendix C, *infra,* pages 22-23.

California Statutes

California Fire Liability Law, Health and Safety Code, §§13007-13009. These and other pertinent California statutory provisions are printed in Appendix D, *infra,* pages 24-25.

Other State Statutes

Statutory provisions of states other than California providing for liability for fire suppression costs and

cited herein are printed in Appendix E, *infra*, pages 26-46.

STATEMENT

Suit under the Tort Claims Act for recovery of fire suppression costs in the amount of $11,128.76 and incurred on and after September 24, 1957, arising from a fire which occurred on September 24, 1957, and burned continuously thereafter. The government's motion to dismiss the complaint for lack of jurisdiction of the District Court over the subject matter was granted by the District Court and affirmed by the Court of Appeals.

The District Court's jurisdiction is founded on 28 U.S.C. §§1346(b) and 2674, Appendix C, *infra*, page 23, (R. 3), the negligent acts complained of occurring and the suppression expenses having been incurred within the Northern District of California.

On September 24, 1957, as alleged in the complaint (R. 3-9), employees of the United States Forest Service set fire to flammable vegetation on United States owned and controlled land in the Klamath National Forest in connection with a land clearance project of the United States Forest Service (R. 4). This fire escaped the control of the Forest Service employees who set it and were controlling it and the fire spread from the United States lands to timber, grass, and brush-covered lands situated within the State of California not owned or controlled by the United States (R. 5) and thence on into the State of

Oregon.[2] It is alleged that the Forest Service employees were negligent and failed to exercise reasonable care in setting the fire, and in controlling it and that the uncontrolled fire was proximately caused by this negligence and failure to exercise reasonable care (R. 5). It is alleged that the State of California, acting by its State Forester and Division of Forestry incurred expenses in suppressing the fire within the State in the amount of $11,128.76 (R. 5). The action to recover these costs was brought under the authority and pursuant to the provisions of California Health and Safety Code §§13007-13009 (R. 3).

The Government's motion to dismiss the action was based upon lack of jurisdiction of the District Court in that the complaint was based on a claim in excess of $10,000 which sounds in implied contract (28 U.S.C. §1346(a)(2)) (R. 14-15). The District Court in granting the motion and dismissing the action (195 F.Supp. 793; R. 15-17), and the court of appeals (307 F.2d 941; R. 24-29; Appendix A, *infra*, pages 13-20) found it unnecessary to decide this point, holding that the plaintiff's claim for fire suppression costs did not constitute a claim for "injury or loss of property" in any event under the Tort Claims Act and hence was not recoverable under the Act (28 U.S.C. §1346(b)).

[2] An action was brought by the State Forester of the State of Oregon against the United States in the District Court for Oregon for recovery of the costs of suppressing this same fire incurred by that State. That court dismissed the action for want of jurisdiction (195 F.Supp. 276) and the dismissal was affirmed by the Court of Appeals of the Ninth Circuit (308 F.2d 568).

REASONS FOR GRANTING THE WRIT

This Case Presents an Important Question of Federal Law Which Should Be Settled by This Court.

This case presents an important question of the construction of the Federal Tort Claims Act which has not been, but should be, settled by this Court. In its decision the Court of Appeals held that the District Court under the Tort Claims Act does not have jurisdiction of a claim for damages against the United States for fire suppression costs apart from any related claim for damage or injury to property. We have found no case in which this Court has dealt with an action under the Tort Claims Act for recovery of fire suppression costs arising from the tortious conduct of federal employees.[3] Nor have we found any case in which this Court has construed the words "claims . . . for money damages . . . for injury or loss of property" in 28 U.S.C. §1346(b) to require the allegation of injury to property apart from alleging a cause of action in tort under the applicable local law.

It is fair comment that the industrial and residential growth of heretofore rural areas and closely related forest, brush, and grass covered areas puts an increasing responsibility on public agencies to afford adequate public fire protection. The dangers of

[3] There is no issue in this case as to the applicability of the "public fireman" doctrine referred to in *Dalehite* v. *United States*, 346 U. S. 15, 42-44 (1953). In *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-321 (1957) this Court held that the doctrine does not prevent liability of the United States under the Tort Claims Act for damages resulting from the negligence of Forest Service employees in fighting a fire.

conflagration exist whether the fire occurs accidently or through someone's tortious acts and whether or not the fire might fortuitously happen to burn property owned by the agency affording fire protection. California Health and Safety Code §13009, under which this action was brought, was designed to relieve the agency incurring costs for suppressing fires caused by another's wilful, negligent, or unlawful action and to impose financial responsibility for such suppression upon the person at fault.[4] California is but one of 25 states having statutes expressly providing for recovery by way of legal action of the costs of suppression of fires wrongfully caused.[5] Not one of these statutes, including that of California, requires as a

[4] *County of Ventura* v. *Southern California Edison Company*, 85 C.A. 2d 529, 533-534, 193 P.2d 512 (1948) holding the defendant therein liable under the statutory predecessor of Health and Safety Code § 13009 (Stats. 1931, ch. 790, p. 1644, § 3) for costs of suppressing a fire caused by the negligent maintenance of a power line.

[5] Alabama—Code of Alabama 1940, Tit. 8, §205; Arkansas—Ark. Stats. 1947, § 41-509; Connecticut—General Statutes of Connecticut, § 23-52; Delaware—7 Del. C., § 3106; Florida—F.S.A., § 590.26; Georgia—Code Ga., § 43-220; Idaho—Idaho Code, § 38-125; Kentucky—K.R.S., 149.180; Louisiana—R.S. 1950, 56:1481; Maryland—Code Md. 1957, art. 66C, §355; Massachusetts—Mass. G.L., c. 226, § 8; Michigan—Public Acts, Act 199 (Compiled Laws of Mich. 1948, Supp. 1956, § 320.13a); Mississippi—Miss. Code of 1942, Recompiled, § 6046; New Hampshire—N. H. Rev. Stat., §§ 224-23, 224-28; New York—Conservation Law of New York, § 53.5; Oregon—O.R.S., 477.068; Pennsylvania—32 P. S., § 345; Rhode Island—Gen. L. of R. I. (1956) § 2-12-14; Tennessee—T. C. A., §§ 39-512, 39-513; Utah—U. C. A. 1953, § 24-2-11; Virginia—Code 1950, §§ 10-61, 10-61.1, 10-62, 10-64; Washington—R.C.W. 76.04.370, 76.04.380, 76.04.390; West Virginia—West Virginia Code of 1961, ch. 20, art. 3, pt. 1, § 2284; Wisconsin—W. S. 1953, Tit. IV, Ch. 26, § 26.14(8)(b). These statutory provisions are printed in Appendix E, *infra*, pages 26, et seq.

condition for recovery of such a claim that the plaintiff allege or prove any injury to his property by the fire. To defeat the claim under these statutes for costs of suppressing a fire negligently caused by federal employees on the sole ground that no property owned by the plaintiff was injured by the fire substantially defeats the purpose of Federal Tort Claim Act (*infra*) and of the individual local statute as well.

By conditioning recovery under the Tort Claims Act on an injury to property, the Court of Appeals has put a novel and unexpected construction on the Tort Claims Act which affects the whole concept of recovery under the Act. This Court has never expressly construed the words "injury or loss of property" in 28 U.S.C. §1346(b). It has long been understood that these words used disjunctively with the words "or personal injury or death caused by the negligent or wrongful act or omission of any employee. . . ." (28 U.S.C. §1346(b)) are merely generally descriptive of "damages" recoverable in tort under appropriate law.[6] This court in considering the claims allowable under the act has never limited the damages recoverable or the claim under the Tort Claims Act

[6] This court has explained that, subject to the applicability of appropriate law, the Act: renders "the Government liable in tort" *Richards* v. *United States*, 369 U.S. 1, 6 (1962); "makes the United States liable . . . for the negligence of its employees" *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318 (1957) and *Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 129 (1956); was designed "to compensate the victims of negligence in the conduct of governmental activities" *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68 (1955); makes "the United States . . . responsible in damage for its torts" *Gardner* v. *Panama Railroad Co.*, 342 U.S. 29, 31

to the condition that there be "injury to person or property."[7] Indeed, while damages for such intangible items as loss of profits,[8] loss of consortium,[9] mental pain and suffering,[10] etc. are usually claimed in connection with some related physical injury to the person or property of a party plaintiff, such claims are not necessarily so related.[11] To so condition tort liability of the United States places a strained and artificial condition upon liability thereunder[12] which departs from the purpose of that act

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(1951); provides "for District Court jurisdiction under *any* claim founded on negligence brought against the United States" [emphasis in text] *Brooks* v. *United States*, 337 U.S. 49, 51 (1949) construing 60 Stat. 842, 28 U.S.C. [1946 ed] § 931(a), Appendix C, *infra*, page 22.

[7] 307 F.2d 944, Appendix A, *infra*, page 13, (R. 28).

[8] *United States* v. *Griffith, Gornall & Corman, Inc.*, 210 F.2d 11, 13 (10th Cir, 1954); *Merchants Matrix Cut Syndicate, Inc.*, v. *United States*, 284 F.2d 456, 458-459 (7th Cir, 1960).

[9] *Aubrey* v. *United States*, 254 F.2d 768, 772 (D.C. Cir, 1958).

[10] *George* v. *United States*, 295 F.2d 310, 311 (7th Cir, 1961); *Baldowski* v. *United States*, 111 F.Supp. 653, 656-657 (D.C., S.C., 1953).

[11] Note that in *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956), this Court recognized but made no comment in this connection an award for damages for "mental pain and suffering" in an action for recovery under the Tort Claims Act for injuries to horses and burros owned by the plaintiffs and not related to any claim of any other personal injury to the plaintiffs.

[12] In *Richards* v. *United States*, 369 U.S. 1, 11 (1962) in referring to the Federal Tort Claims Act, this Court said, "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' We should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act such as the one before us which, as we have indicated, is so ultimately related to state law."

to impose tort liability on the United States to the same manner and to the same extent to private individuals under like circumstances[13] *(infra)*. The liability for fire suppression costs in this case is based upon the negligence of employees of the United States (R. 3-6). This case, therefore, presents a clear-cut issue as to the character of the claim against the United States for damages as related to "injury to property" and presents an important question for determination by this court.

The Decision of the Court of Appeals Conflicts With the Decisions of This Court and the Courts of Appeals of Other Circuits With Respect to the Liability Imposed by State Law.

The Court of Appeals predicated its holding that the plaintiff's claim for fire suppression costs was not within the jurisdiction of the District Court under the Tort Claims Act on the ground that a claim for such damages does not constitute a claim for damages for injury to property. In considering *Rayonier* v. *United States* 352 U.S. 315 (1957) the court stated that that "action, however, involved the destruction of 'timber, buildings and other property some of which belonged to the petitioners'. . . ." (307 F.2d 944, R. 28, Appendix A, *infra*, page 18). The court further stated, "*Indian Towing Co.* v. *United States*[14] likewise involves an action for damages to property, being the *Tug Navajo*, due to negligence of the Coast

[13] 28 U.S.C. §§ 1346(b) and 2674.
[14] 350 U.S. 61 (1955).

Guard in the operation of a lighthouse" (307 F.2d 944, R. 28, Appendix A, *infra*, page 18. The court went on to say at 307 F.2d 944 (R. 28, Appendix A, *infra*, page 18), "In fact, we are unable to find a single instance in the history of litigation involving the Tort Claims Act where recovery was permitted in the absence of injury to person or property."

This holding and these statements conflict with decisions of this Court [15] and of the courts of appeals of other circuits [16] to the effect that "[t]he Act makes the United States liable for the negligence of its employees 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" [17] California Health and Safety Code Sections 13007-13009 clearly provide for liability of private individuals and in favor of public agencies for recovery of the costs of suppressing fire negligently caused [18] irrespective of whether the fire

[15] *Richards* v. *United States*, 369 U.S. 1, 6-7, 9, 11 (1962); *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318 (1957); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955).

[16] *United States* v. *Gregory*, 309 F.2d 11, 12 (10th Cir. 1962); *United States* v. *Schultz*, 282 F.2d 628, 631 (1st Cir. 1960); *Schmid* v. *United States*, 273 F.2d 172, 176 (7th Cir. 1959).

[17] *Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 129 (1956).

[18] *County of Ventura* v. *Southern California Edison Co.*, 85 C.A.2d 529, 193 P.2d 512 (1948). See also, *People* v. *Zegras*, 29 C.2d 67, 172 P.2d 883 (1946). Both of these cases were brought under the statutory predecessor of Health and Safety Code §§ 13007-13009 (Stats. 1931, ch. 790, p. 1644, Appendix D, *infra*, pages 24-25).

injures or destroys any property owned by the agency incurring the costs. This is a conflict, at least in principle, and not simply error in that the court below construed the narrow and limited language "injury or loss of property" to the exclusion of the context and purpose of the act as held by this Court to be controlling.[19]

In applying the above principle of construction of the act, this Court,[20] as well as the courts of appeal of other circuits,[21] has held that the measure and extent of damages under the act is governed by the applicable state law. The decision of the court below conflicts, at least in principle, with these decisions in failing to apply the measure and extent of damages under the law of California as set forth in Health and Safety Code §13009 as to the measure and extent of damage and, instead, grounding its decision on the unrelated matter of the nature of the injury.

[19] *Richards* v. *United States*, 369 U.S. 1, 11 (1962).

[20] *Richards* v. *United States*, 369 U.S. 1 (1962); *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956).

[21] *United States* v. *State Road Department of Florida*, 189 F.2d 591, 596 (5th Cir. 1951); *Oman* v. *United States*, 179 F.2d 738, 742 (10th Cir. 1949).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA, *Appellant,* vs. UNITED STATES OF AMERICA *Appellee.*	No. 17,534 Sept. 20, 1962

On Appeal From the United States District Court for the Northern District of California Southern Division

Before: BARNES and HAMLIN, Circuit Judges, and HODGE, District Judge.

HODGE, District Judge:

This is an appeal from a judgment of the District Court dismissing appellant's action for lack of jurisdiction over the subject matter. Appellant filed its "complaint for damages" under the Federal Tort Claims Act, 28 U.S.C.A., Section 1346(b), to recover expenses incurred by the State of California in suppressing an uncontrolled fire on land within the State in the sum of $11,128.76. The complaint alleged that employees of the United States Forest Service set fire to flammable vegetation on land owned and controlled by the United States within the Klamath National Forest in connection with a land clearance reforestation project, that said agents and employees of the

United States failed to exercise reasonable care and were negligent in failing to control the fire; as a proximate result of which negligence there resulted an uncontrolled fire upon land covered by timber, grass, brush and other flammable vegetation "not owned by the United States," by reason of which the State, through it's State Forester and Division of Forestry, Department of Natural Resources, incurred the expenses complained of. The action was also based upon the provisions of the California Health and Safety Code, Sections 13007 to 13009 inclusive. The pertinent parts of Section 1346(b) and the Health and Safety Code are set forth in the margin herein.[1]

[1] 28 U.S.C.A., Sec. 1346(b) provides as follows:

". . . the district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Sections 13007 to 13009 of the Health and Safety Code of the State of California provide as follows:

"Section 13007: Any person who personally or through another wilfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire.

"Section 13008: Any person who allows any fire burning upon his property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire.

"Section 13009: The expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires. Such charge shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied."

Appellee filed a motion to dismiss the action for lack of jurisdiction over the subject matter on the grounds that the complaint is based upon a claim in excess of $10,000.00 which sounds in implied contract and is therefore beyond the jurisdiction of the court under the Tucker Act, Section 1346(a), Title 28 U.S.C.A. The State resisted the motion upon the grounds that the liability imposed by the California statute is essentially tortious because it is grounded upon negligence. The court found that it was unnecessary to consider these questions for the reason that the Federal Tort Claims Act does not confer jurisdiction upon the court to entertain the State's claim regardless of whether it sounds in contract or in tort, as the relevant portion of the Act provides that the District Courts shall have exclusive jurisdiction of civil actions on claims against the United States for money damages only "*for injury or loss of property*" caused by the negligent or wrongful act or omission of an employee of the Government. Appellant urges that this construction of the statute was error.

The appeal presents a question of first impression as to whether suit may be brought against the United States upon a claim for recovery of expenses incurred by a state agency in suppressing a fire negligently set and allowed to escape to private property, which, in turn, requires an interpretation of the Tort Claims Act and a consideration of the law of the State of California as it relates to such claim.

We note, first, the fundamental principle that, whether the action be a contractual claim or one in tort, suit may be maintained against the United States only to the extent that the government has waived its sovereign immunity and consented to suit. *Drake* v. *Treadwell Construction Company*, (C.A. 3, 1962) 299

F. 2d 789. Also the express language of the Tort Claims Act granting relief for any damages "for injury or loss of property, or personal injury or death."

Both parties devoted considerable argument upon the question of whether or not this action is founded in contract or in tort. It will be observed that Sections 13007 and 13008 of the California statute provide a remedy in damages to the owner of property caused by a fire negligently set or negligently failed to control, whereas Section 13009 provides that the expenses of fighting such fires are a charge against any person made liable by the preceding sections, which charge

> "shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, express or implied."

The District Court of Appeal of the Third District of California in the case of *People* v. *Zegras*, 165 P. 2d 541, in considering the language of an identical prior statute since incorporated in the Health and Safety Code, expressly held that the expense incurred by the State in suppressing a fire is founded upon an implied contract imposing a personal liability for debt. The Supreme Court of the State of California on an appeal from such decision in *People* v. *Zegras*, 172 P. 2d 883, affirmed this decision but limited its opinion to the question of procedure, the case involving a motion for change of venue, and held that the language of the statute makes applicable to such an action the procedure governing a suit upon a contract, express or implied, and that

> "It is immaterial, therefore, whether the statutory obligation for the expense of extinguishing a fire is classified as one sounding in tort, or a quasi-contract, or a liability in the nature of a penalty;"

But whether the action is founded in tort or on contract the district court had no jurisdiction in either case, for if in tort the complaint does not claim an "injury or loss of property;" and if on contract the action is beyond the jurisdictional limit of the court.

Appellant relies upon the principle announced in *Rayonier, Inc.* v. *United States*, 352 U.S. 315; *Feres* v. *United States*, 340 U.S. 135; *Indian Towing Co.* v. *United States*, 350 U.S. 61; and *Arnhold* v. *United States* (C.A. 9) 284 F. 2d 326, that the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the law of the state where the acts occurred.[2] Such liability, however, must be restricted to the jurisdictional provisions of the statute, 28 U.S.C.A. Section 1346(b), which limits the jurisdiction of civil actions on claims against the United States for money damages "for injury or loss of property."

In *Rayonier, Inc.* v. *United States*, the Supreme Court held that the United States is not immune from liability for negligence of employees of the Forest Service in fighting a fire, if in similar circumstances a private person would be liable under the laws of

[2] See also Section 2674, Title 28 U.S.C.A., which provides that: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ."

the State of Washington, in which the fire occurred. The action, however, involved the destruction "of timber, buildings and other property some of which belonged to the petitioners," and is not authority for the proposition here considered.

Feres v. *United States* involved the question of liability under the act for injuries to service men arising out of and in the course of military service and holds that the Tort Claims Act should be construed to fit so far as will comport with its words into the entire system of remedies against the Government. *Indian Towing Company* v. *United States* likewise involves an action for damages to property, being the *Tug Navajo*, due to negligence of the Coast Guard in the operation of a lighthouse. The case of *Arnhold* v. *United States*, with which is consolidated *Rayonier, Inc.* v. *United States*, decided by this court in 1960, was an appeal from the District Court from a decision dismissing the case following the remand by the Supreme Court, and reaffirms the proposition that under the Federal Tort Claims Act we have to determine whether the United States, if it had been a private party, would have been liable for the losses under the Washington law; but this case again relates to damages to property, not expenses in fighting a fire.

In fact, we are unable to find a single instance in the history of litigation involving the Tort Claims Act where recovery was permitted in the absence of injury to person or property.

Appellant also contends that Section 1346(b) does not require an injury to property in the sense contended by appellee but that any interest in lands is sufficient, citing *Oman* v. *United States*, 179 F. 2d 738; but no such claim is made in the complaint in this case.

Appellant further contends that aside from the Health and Safety Code it has a claim under the common law, referring to *United States* v. *Chesapeake & O. Ry. Co.*, 130 F. 2d 308. This case holds that the federal government is entitled to recover expenses incurred in fighting a fire under a Virginia fire suppression cost act and also to relief in tort upon the principle that the owner of property is entitled to such protection against the "evident danger of the destruction of his property." This principle, however sound, cannot apply in actions against the Government by reason of the limited jurisdiction conferred by the Tort Claims Act.

Finally, appellant asserts for the first time on appeal, that the State was acting to protect its property, being the natural resources of the State, such as fish and game in the area, from destruction by an uncontrolled fire, and requests leave to amend its complaint to plead expenses incurred for such purpose. Any such claim would still not constitute a claim for damage or injury to property within the meaning of the Act.

We find it unnecessary to consider, in view of the above, the question of whether or not the claim comes

within any of the exceptions to the Tort Claims Act provided by Section 2680 of Title 28.

The judgment of the District Court dismissing the action is affirmed.

(Endorsed) Opinion Filed September 20, 1962.

FRANK H. SCHMID, Clerk.

APPENDIX B

Judgment of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 17,534
Judgment

APPEAL from the United States District Court for the NORTHERN District of CALIFORNIA, SOUTHERN DIVISION.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the NORTHERN District of CALIFORNIA, SOUTHERN DIVISION and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered September 20, 1962.

APPENDIX C

Pertinent Federal Statutory Provisions

28 U.S.C. § 1346(a)(2) and (b)

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Act of August 2, 1946, 60 Stat. 842 (28 U.S.C. [1946 ed.] 931 (a))

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or

omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

28 U.S.C. 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

APPENDIX D

Pertinent California Statutory Provisions

HEALTH AND SAFETY CODE, § 13007

Any person who personally or through another wilfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows a fire kindled or attended by him to escape to, the property of another, whether privately or publicly owned, is liable to the owner of such property for any damages to the property caused by the fire.

HEALTH AND SAFETY CODE, § 13008

Any person who allows any fire burning upon his property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire.

HEALTH AND SAFETY CODE, § 13009

The expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires. Such charge shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, express or implied.

STATS. 1931, ch. 790, p. 1644, §§1-3

1. Any person who:

(1) Personally or through another, and

(2) Wilfully, negligently, or in violation of law, commits any of the following acts:

(1) Sets fire to,

(2) Allows fire to be set to,

(3) Allows a fire kindled or attended by him to escape to the property, whether privately or public owned, of another, is liable to the owner of such property for the damages thereto caused by such fire.

2. Any person who allows any fire burning upon his property to escape to the property, whether privately or publicly owned, of another, without exercising due diligence to control such fire, is liable to the owner of such property for the damages thereto caused by such fire.

3. The expenses of fighting such fires shall be a charge against any person made liable by this act for damages caused thereby. Such charge shall constitute a debt of the person charged and shall be collectible by the party, or by the federal, state, county, or private agency incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied.

APPENDIX E

Statutes of Other States Relating to Recovery of Fire Suppression Costs

Alabama

Code of Alabama 1940, Tit. 8, § 205

"Any fire burning uncontrolled on any forested, cut over, brush land or grass land area is hereby declared to be a public nuisance by reason of its menace to life and property. Any person, firm, association, or corporation responsible either for the starting or the existence of such fire is hereby required to make a reasonable effort to control or extinguish it as soon as he has knowledge thereof, and if such person, firm, association, or corporation shall refuse or neglect to do so, any organized fire suppression force may suppress the nuisance thus constituted, by controlling and extinguishing the fire, and the cost thereof may be recovered from said person, firm, association, or corporation responsible for the starting or existence of such fire."

Arkansas

Arkansas Statutes 1947, § 41-509

"Any fire on any forested, cut-over, brush lands or grasslands burning uncontrolled is hereby declared a public nuisance by reason of its menace of life or property. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to control or extinguish it immediately and if said person, firm or corporation shall refuse, neglect or fail to do so, any organized fire suppression force may summarily abate the nuisance thus constituted by controlling or extinguishing the

fire and the cost thereof may be recovered from said responsible person, firm or corporation by civil action."

Connecticut

General Statutes of Connecticut, § 23-52

"Any sum not exceeding two hundred dollars necessarily expended by the state for extinguishing any grass, brush or forest fire may be recovered from the person causing such fire, by agreement with such person or in an action brought for such purpose."

Delaware

7 Delaware Code, § 3106

"Whoever wilfully, maliciously or carelessly sets fire to forest lands, in addition to the penalties provided for such violation and the liability for damages to persons suffering loss thereby, shall be liable to the State of Delaware for all expenses incurred in combatting and extinguishing such fire."

Florida

Florida Statutes Annotated, § 590.26

"Whoever willfully or carelessly, shall cause an unlawful forest, grass, or a woods fire, shall in addition to all other penalties provided by law be liable for payment of all reasonable costs and expenses incurred in suppressing same; said costs and expenses shall be payable to the Florida board of forestry; when costs are not paid in a reasonable time on demand, it shall be the duty of the state's attorney of such county wherein any violation hereof shall occur to take proper proceedings for collection of such costs and charges. The liability for cost of suppression shall

obtain whether there be criminal prosecution or not and the liability shall extend to the person or persons, firm or corporation causing, directing or permitting such activity as well as to the actual violator."

Georgia

Georgia Code, § 43-220

"Any fire burning uncontrolled on any forested, cut over, brushland or grasslands is hereby declared to be a public nuisance by reason of its menace to life and property. Any person, firm or corporation responsible either for the starting or the existence of such fire is hereby required to control or extinguish it immediately, and if such person, firm or corporation shall refuse or neglect to do so, any organized fire suppression force may suppress the nuisance thus constituted, by controlling and extinguishing the fire, and the cost thereof may be recovered from said responsible person, firm or corporation."

Idaho

Idaho Code, § 38-125

"Any forest fire in any forest protective district burning without adequate and proper precautions having been taken to prevent its spread, is hereby declared a public nuisance, by reason of its menace to life and/or property. Any person responsible through his conduct, acts and/or control of property or operations for either the starting or the existence of such fire is hereby required to make a reasonable effort to control or extinguish it immediately, without awaiting instructions from the state forester or a fire warden, and if such person so responsible therefor, shall refuse, neglect or fail to do so, the state forester or any

fire warden may summarily abate the nuisance thus constituted by controlling or extinguishing such fire, and the cost of the work so performed, together with the cost of necessary patrol occasioned by such fire, plus a penalty of ten per cent added to the total of such items, shall be a lien upon the property of the offender, and unless paid by the offender to the state forester within ten days after the state forester has made demand in writing, shall be collected as provided in section 38-110."

Kentucky

Kentucky Revised Statutes, 149.180

"Whenever possible, the Director of the Division of Forestry shall collect the costs of fire fighting done under the direction of the forest warden in accordance with the provisions of KRS 149.140 to 149.190 and approved as provided in KRS 149.160, from the person responsible for the origin of the fire by his negligence or intent, and shall return any costs so collected to the State Treasury for credit to the special fund provided for in KRS 149.190, and such amounts shall be repaid to the county in which the costs were incurred, but not exceeding the payments made by that county in the fiscal year in which such costs were accrued, and the funds so repaid to the county shall be placed in the County Forest Fire Protection Fund provided for in KRS 149.156. The Commonwealth's attorney of the county in which the fire occurred shall institute and prosecute the necessary proceedings."

Louisiana

Louisiana Revised Statutes of 1950, 56:1481

"In a prosecution for the wilful and negligent setting fire to forests, when the evidence has been conclusive of the guilt or innocence of the party charged with the offense, the court may take evidence as to the cost of fighting the fire which the accused is charged with setting, and may assess such costs as a part of the penalty against the person charged."

Maryland

Code of Maryland, 1957, Art. 66C, § 355

"All individuals or corporations causing fires by violations of §§ 352, 353 and 354 of this subtitle shall be liable to the State, and to the county in which the fire occurred, in an action for debt to the full amount of all expenses incurred by the State or county in fighting and extinguishing such fire."

Massachusetts

Massachusetts General Laws, C. 266, § 8

"Whoever, not being a tenant thereof, sets or increases a fire upon land of another whereby the property of another is injured, or whoever negligently or wilfully suffers any fire upon his own land to extend beyond the limits thereof whereby the woods or property of another are injured, shall be punished by a fine of not more than two hundred and fifty dollars or by imprisonment for not more than ninety days, and the town where such fire occurred may recover in an action of tort, brought within two years after the cause of action accrues, against any such person the expense of extinguishing such fire."

Michigan

Public Acts 1949, Act 199 (Compiled Laws of Michigan 1948, Supp. 1956, § 320.13a)

"Any person, firm, company, partnership, association or corporation who shall set fire on any land and negligently allow such fire to escape and become a forest or grass fire shall be liable for all expenses incurred by the state of Michigan in the suppression of such fire; but not including expense for the services of personnel and equipment of the department of conservation. The director of conservation, acting for and in behalf of the state of Michigan, shall certify in writing to such person, firm, company, partnership, association or corporation, the claim of the state and shall list thereon the items of expense incurred in the suppression of such fire. Said claim shall be paid within 60 days and, if not paid within that time, the said director of conservation, acting for and in behalf of the state, may bring suit against said person, firm, company, partnership, association or corporation in a court of competent jurisdiction in the county of the residence of the defendant or of any defendant, if there be more than 1 for the collection of such claim at any time within 2 years thereafter: Provided, however, That where the amount of such claim shall be cognizable by a circuit court the said director of conservation may, in his discretion, file such suit in the circuit court of Ingham county or in the circuit court of the county of residence of the defendant or of any defendant if there be more than 1."

Mississippi

Mississippi Code of 1942, Recompiled, § 6046

"Any fire on any forested, cut-over, brush lands or grass lands burning uncontrolled is hereby declared a public nuisance by reason of its menace to life and property. Any person, firm or corporation negligently or wilfully and maliciously responsible for the starting or the existence of such fire on land other than his own is hereby required to control or extinguish it immediately, and if said person, firm or corporation shall wilfully refuse, neglect or fail to do so, any organized fire suppression agency recognized by the Mississippi Forestry Commission, may summarily abate the nuisance thus constituted by controlling or extinguishing the fire. The cost of abating such nuisance, with all costs and reasonable attorney's fees to be allowed by the court, may be recovered from the person, firm or corporation responsible for such nuisance by civil action in the proper court. Action for said recovery to be filed by the agency abating the nuisance. Provided that this act shall not impair any remedy now allowed by law."

New Hampshire

New Hampshire Revised Statutes, §§ 224-23, 224-28

224-23. "The expenses lawfully incurred by a warden or deputy warden in the prevention and extinguishment of forest and brush fires in unorganized places, computed at rates within limits established by the forestry and recreation commission and excluding the initial cost of fire fighting equipment, shall be paid in the first instance by the state. Any person causing or kindling a fire in an unorganized place without a permit from the forest fire warden or from the prop-

erty owner, when such permit is required under section 27 of this chapter, and any person by whose negligence or the negligence of his agents any fires shall be caused, shall be liable to the state in a civil action for the payment of all expenses incurred in extinguishing said fire. In the event that a fire results from unknown or natural causes, up to one-half of said costs, but in no case to exceed ten per cent of the assessed valuation of the property in said place, shall thereafter be added to the tax assessed the following year against said place in the same manner as is provided for the assessment of property taxes therein."

224-28. "Any person causing or kindling a fire without permit of the forest fire warden, when such permit is required, and any person by whose negligence or the negligence of his agents any fire shall be caused, shall be liable in a civil action for the payment to the town, or the state or the United States, or any or all of the same, of the expenses incurred by the forest fire warden or deputy warden in attending or extinguishing such fire. The items of expenses of said fire shall be approved in writing by the state forester."

New York

Conservation Law of New York, § 53.5

"Recovery of expenses. Any moneys necessarily expended by the state, a municipality, or any person in fighting forest fires may be sued for by the state, municipality or person expending the same and recovered from the person causing the fire. Such actions may be maintained in addition to other actions for damages or penalties and may be demanded in the same or separate actions."

Oregon

Oregon Revised Statutes. 477.068

"(1) In case such owner, easement holder, operator and person in possession, or any of them, shall fail to make the effort required by ORS 477.066, or where such owner, easement holder, operator or person in possession is wilful, malicious or negligent in the origin of the fire, the actual cost of controlling or extinguishing the fire shall be recovered from such owner, easement holder, operator or person in possession when necessary by an action prosecuted in the name of the State of Oregon or such forest protective agency or both.

"(2) An itemized statement of the actual costs incurred by the forester or agency, or both, certified to by the forester, shall be accepted as prima facie evidence of such costs in any suit or action authorized by this section.

"(3) The cost in cases covered by ORS 477.066 shall constitute a general lien upon the real and personal property of such owner, easement holder, operator or person in possession. A written statement and notice of the lien, containing a description of the property and a statement of the cost, shall be certified under oath by the forester or any warden and filed in the office of the county clerk of the county in which the lands and personal property are situated within six months after extinguishment of the fire, and may be foreclosed by suit in the manner provided by law for foreclosure of liens, for labor and material. The lien provided for in this section shall be inferior to any existing lien.

"(d) Upon request of the forester, the district attorney for the district in which the lands and personal property are situated or the Attorney General shall prosecute such action or foreclose the lien in the name of the State of Oregon or such forest protective agency or both. Liens provided for in this section shall cease to exist unless suit for foreclosure is instituted within six months from the date of filing the same."

Pennsylvania

32 Penna. Statutes, § 315

"The Department of Justice, acting for and on behalf of the Department of Forests and Waters, may recover the expenses incurred by the latter department on account of any forest fire, from the person liable for payment of such expenses, by instituting, in the name of the Commonwealth, an action of assumpsit in any county in which the defendant can be served with process, but no such action shall be brought, unless the person liable for the payment of such expenses has failed to pay the same within thirty days after receiving a bill therefor from the Department of Forests and Waters.

"All moneys recovered by the Department of Justice in such action shall be paid into the General Fund of the State Treasury."

Rhode Island

General Laws of Rhode Island 1956, 2-12-14

"(a) Any person, firm or corporation, being upon the land of another, or upon any highway adjacent thereto, who shall negligently or carelessly set or maintain, or cause to be set or maintained, fire upon

the land of another, shall, upon conviction, be punished by a fine of not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00) or by imprisonment for not less than ten (10) days nor more than thirty (30) days, or by both such fine and imprisonment, and shall be liable for all damages caused thereby and to civil action for the payment to the state or town for all expenses incurred by the town or district warden or any other authorized forest fire official in attending or suppressing such fire or fires as result from such action.

"(b) Whoever, being upon the land of another or upon any highway adjacent thereto, wilfully sets or maintains or wilfully causes to be set or maintained fire upon land of another, shall, upon conviction, be punished by a fine of not more than two thousand dollars ($2,000.00) nor less than twenty-five dollars ($25.00) or by imprisonment for not more than five (5) years nor less than thirty (30) days, or by both such fine and imprisonment and shall be liable for all damages caused thereby and to civil action for the payment to the state or town for all expenses incurred by the town or district warden or any other authorized forest fire official in attending or suppressing such fire or fires as result from such action.

"(c) Any person, firm or corporation who negligently or carelessly suffers or permits any fire upon his or its own land to extend beyond the limits thereof, whereby the woodlands or property of another are damaged, shall be liable for all damages caused thereby and to civil action for the payment to the state or town for all expenses incurred by the town or district warden or any other authorized forest fire official in attending or suppressing such fire or fires as result from such action."

Tennessee

Tennessee Code Annotated, §§ 39-512, 39-513

39-512. "It shall be unlawful for any person, firm or corporation originating, or causing to be originated, or using, an open air fire within one hundred fifty (150) feet of forests and/or woodlands, or within one hundred fifty (150) feet of other inflammable material, the setting of fire to which inflammable material would naturally and proximately result in such fire being conveyed to woodlands and/or forests, to leave such fire unattended without totally extinguishing the same. Any person, firm or corporation violating the provisions of this section shall upon conviction be fined not less than five dollars ($5.00) nor more than fifty dollars ($50.00), together with the cost of the cause, and justices of the peace are given jurisdiction to hear such cases under the small offense laws."

39-513. "Any person, firm or corporation violating the provisions of § 39-512 shall be liable civilly for damages proximately resulting from such violation, including all costs incurred in efforts to extinguish said fire. In case the state of Tennessee through the state division of forestry should incur any such expense in efforts to extinguish such fire, it shall have the benefit of the provisions of the preceding sentence. It shall be the duty of the district attorney-general of the circuit in which such funds are expended to represent the state division of forestry in any action brought hereunder. Any judgment so obtained upon behalf of the state division of forestry shall, when collected, be paid into the forestry fund of the state treasury."

Utah

Utah Code Annotated 1953, § 24-2-11

"Any person responsible for the existence or spread of a wildland fire necessitating suppression action shall be liable for the payment of costs therefor. It shall be the duty of the attorney general to prosecute action for collection of suppression costs or other damage of such fires on or originating on state lands."

Virginia

Code of Virginia, 1950, §§ 10-61, 10-61.1, 10-62, 10-64

10-61. "Any person who negligently, carelessly, or intentionally without using reasonable care and precaution to prevent its escape, starts a fire which burns on forest land, brushland or wasteland, shall be liable for the full amount of all expenses incurred, both by the county and by the Commonwealth, for fighting or extinguishing such fire, all of which shall be recoverable by action brought by the State Forester in the name of the Commonwealth. It shall be the duty of the Commonwealth's attorneys of the several counties to institute and prosecute proper proceedings under this section, at the instance of the State Forester.

"The provisions of this section shall cover every manner or way in which forest land or brushland or wasteland fires may be started, whether by direct act, or by an appliance or by indirection.

"The term 'person' as used in this section shall include individuals, associations, partnerships, joint stock companies and corporations, and their officers, servants, agents and employees. Every county in which a fire has occurred for the suppression of which any costs are collected pursuant to this section shall be reimbursed by that proportion of any amount so collected which the cost incurred by such county in

the suppression of such fire bears to the entire cost of its suppression."

10-61.1. "Whenever it shall be established that a forest, brush, or grass fire originated from the negligent construction, maintenance or operation of an electric transmission line or of the right of way, the owner of the line shall pay to the State and the county in which such fire occurred all expenses incurred by them in suppressing the fire. Such fire suppression expenses shall be recoverable by action at law brought by the State Forester in the name of the Commonwealth on behalf of the Commonwealth and on behalf of the board of supervisors of the county or counties in which the fire burned.

"It shall be the duty of the Commonwealth's attorneys of the several counties to institute and prosecute proper proceedings under this section, at the request of the State Forester."

10-62. "(a) It shall be unlawful for any owner or lessee of land to set fire to, or to procure another to set fire to, any woods, brush, logs, leaves, grass, debris, or other inflammable material upon such land unless he previously shall have taken all reasonable care and precaution, by having cut and piled the same or carefully cleared around the same, to prevent the spread of such fire to lands other than those owned or leased by him. It shall also be unlawful for any employee of any such owner or lessee of land to set fire to or to procure another to set fire to any woods, brush, logs, leaves, grass, debris; or other inflammable material, upon such land unless he shall have taken similar precautions to prevent the spread of such fire to any other land.

"(b) During the period beginning March first and ending May fifteenth of each year, even though the precautions required by the foregoing paragraph shall have been taken, it shall be unlawful, in any county or portion thereof organized for forest fire control under the direction of the State Forester, for any person to set fire to, or to procure another to set fire to, any brush, leaves, grass, debris or field containing dry grass or other inflammable material capable of spreading fire, located in or within three hundred feet of any woodland or brushland, except between the hours of four o'clock post meridian and twelve o'clock midnight.

"(c) The provisions of subsection (b) of this section shall not apply to fires which may be set within the corporate limits of any town or city in the State, nor to fires set on rights of way of railroad companies by their duly authorized employees.

"(d) Any person violating any provisions of this section shall, upon conviction, be fined not less than ten or more than one hundred dollars for each separate offense. If any forest fire shall originate as a result of the violation by any person of any provision of this section, such person shall, in addition to the above penalty, be liable to the State and to each county for the full amount of all expenses incurred by the State and the county respectively in suppressing such fire, such amounts to be recoverable by action brought by the State Forester in the name of the Commonwealth on behalf of the Commonwealth and by the board of supervisors on behalf of the county.

"Subsection (b) of this section shall not become effective in any county of the Commonwealth unless and until the same shall have been approved by a majority vote of the governing body of such county."

10-64. "Any individual, firm, or corporation responsible for the operation, in, through or near forest or brushland, of a sawmill, stave mill, heading mill, or any other mill, shall clean the premises for at least a distance of fifty yards in all directions from any fires maintained in or about, or in connection with the operation of such mill and for a distance of one hundred feet in all directions from any sawdust pile, slab pile, or any other inflammable material which accumulates from the operation of such mill, of all matter not essential to the operation of such mill which is liable to take fire from any sparks emitted from such fires. When any such person, firm, or corporation shall remove such mill, or cease to operate it for a period of ten consecutive days, he shall totally extinguish any fire which may be burning in any sawdust pile, slab pile or other debris which may have accumulated from the operation of such mill, unless the owner of the land on which such fire is located shall, in writing, assume responsibility for the control of the fire. Any person, firm or corporation violating any of the provisions of this section shall be fined ten dollars for each offense. Each day or fraction thereof on which any such mill shall be operated in violation of the provisions of this section and each day or fraction thereof on which fire is allowed to burn in any sawdust pile, slab pile or other inflammable debris in violation of the provisions of this section, shall be deemed a separate offense. Whenever it shall be established that a forest fire originated from a fire maintained in or about any such mill, the individual, firm, or corporation, from whose mill any such fire originated shall immediately become liable for all costs incurred in fighting such fire."

Washington

Revised Code of Washington 76.04.370, 76.04.380, 76.04.390.

76.04.370. "Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

"If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence."

76.04.380. "Any fire on any forest land burning uncontrolled and without proper action being taken to

prevent its spread, notwithstanding the origin of such fire, is a public nuisance by reason of its menace to life and property. The owner, operator, or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or warden or ranger; and if such owner, operator, or person in possession refuses, neglects, or fails to do so, the supervisor or any fire warden or forest ranger shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator, or person in possession and if the work is performed on the property of the offender, shall also constitute a lien upon the property or chattels under his ownership. Such lien may be filed by the supervisor in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of mechanics' liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the supervisor.

"The payment of forest patrol assessment on the land shall be interpreted as a reasonable effort in suppressing and extinguishing any fire on the land except when the fire started on that land as a result of owner/operator negligence and except when extra debris is present as described under laws pertaining to slash responsibility.

"When a fire occurs in a logging operation it shall be fought to the full limit of available employees, and such fire fighting shall be continued with the necessary

crews in such numbers as are, in the opinion of the supervisor or his authorized deputies, sufficient to bring the fire to a patrol basis, and the fire shall not be left without a fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor, or his authorized deputies."

76.04.390. "Any person, firm or corporation negligently responsible for the starting or existence of a fire which spreads on forest land shall be liable for any expense incurred by the state, a municipality or forest protective association, in fighting such fire provided that such expense was, at the time incurred, authorized by the state supervisor of forestry or by one of his duly appointed and acting district or state fire wardens. The agency incurring such expense shall have a lien for the same against any property of said person, firm or corporation liable as above provided by filing a claim of lien naming said person, firm or corporation describing the property against which the lien is claimed, specifying the amount expended on the lands on which the fire fighting took place and the period during which the expenses were incurred, and signed by the claimant with post office address. No claim of lien shall be valid unless filed with the county auditor of the county in which the property sought to be charged is located within a period of ninety days after the expenses of the claimant were incurred. The claimant may recover said expenses incurred in a civil action against said person, firm or corporation liable therefor, and shall have in addition the lien remedy above provided. Said lien may be foreclosed in the same manner as a mechanic's lien is foreclosed under the statutes of the state of Washington."

West Virginia

West Virginia Code of 1961, Ch. 20, Art. 3, Part 1, § 2284

"The director shall, in the name of the state, recover from the persons, firms or corporations whose negligence or whose violation of any provision of this article caused any fire at any time on grass or forest land, the amount expended by the state in confining, extinguishing or suppressing such fire and the costs thereof. Such recovery shall not bar an action for damages by any other person.

"Any such fire which was caused by a trespasser or by a person who was upon the property without the consent of the owner shall not be deemed caused by the negligence of the owner; but the owner shall use all practical means to confine, extinguish or suppress any such fire on his land even though it was caused by any such person. If he fails to do so, after becoming aware of such fire, the director shall, in the name of the state, recover from him amounts expended by the state for such purposes and the cost thereof."

Wisconsin

Wisconsin Statutes 1953, Tit. IV, Ch. 26, §26.14, subdiv. (8)(b)

"Any person, firm or corporation who shall set fire on any land and allow such fire to escape and become a forest fire, shall be liable for all expenses incurred in the suppression of such fire by the state or town in which such fire occurred. The commission or the town clerk shall respectively certify to such person the claim of the state or town in writing, and

list thereon the items of expense incurred in the suppression of such fire. Such claim shall be paid within 60 days and if not paid within such time, the state or town may begin an action thereon at anytime within 2 years."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 666

STATE OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Northern District of California (R. 15-17)[1] is reported at 195 F. Supp. 793. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 13-20) is reported at 307 F. 2d 941.

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[1] Record references are to the Transcript of Record filed in this Court by petitioner.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on September 20, 1962. The petition for a writ of certiorari was filed on December 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the claim of a State to recover costs incurred in the suppression of a fire started by federal employees and, through their alleged negligence, allowed to spread beyond federal property is cognizable under the Federal Tort Claims Act.

STATUTES INVOLVED

The Judicial Code, 28 U.S.C. 1346, provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with

> the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * *

Section 13009 of the California Health and Safety Code provides:

> The expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires. Such charge shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, express or implied.

STATEMENT

This action was instituted by petitioner, the State of California, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and arises out of a forest fire which occurred in September 1957 (R. 3, 4). This fire was set by members of the Forest Service, United

States Department of Agriculture, in furtherance of a project of reforestation (R. 4), on lands within the State of California owned by the United States. Alleging negligence by the members of the Forest Service both in setting and controlling the fire and in allowing it to spread to land "not owned by the United States," petitioner sought to recover $11,128.76, the expenses it allegedly incurred in suppressing the fire (R. 5). The claim was based on Section 13009 of the California Health and Safety Code, *supra*, p.3.

After filing its answer (R. 6-9), the United States moved to dismiss the action for lack of jurisdiction over the subject matter (R. 14-15), contending that the rights created by Sections 13007-13009, California Health and Safety Code, sounded in quasi contract and thus were not cognizable under the Tort Claims Act (R. 16). The district court dismissed the action, holding that the claim asserted was not within the Tort Claims Act because it was "unrelated to any claim of damage to property" (R. 17). On appeal, the Court of Appeals for the Ninth Circuit affirmed, agreeing that the claim was not within the Tort Claims Act because of the absence of damage to petitioner's property.[2]

---

[2] As noted by petitioner (Pet. 4, n. 2), an action brought by the State of Oregon under its fire suppression cost statute was dismissed for want of jurisdiction by the District Court for the District of Oregon on the same grounds. That dismissal was affirmed by the Court of Appeals for the Ninth Circuit, 308 F. 2d 568. Oregon has obtained from this Court an extension of time within which to file its petition for a writ of certiorari.

ARGUMENT

The holding of both courts below that petitioner's claim is not within the ambit of the Federal Tort Claims Act is clearly correct. Moreover, there is no conflict with decisions of this Court or any other court—even "in principle," as petitioner claims (Pet. 11). The petition should, therefore, be denied.

1. The keystone of the Federal Tort Claims Act is 28 U.S.C. 1346(b). That section confers jurisdiction upon the district courts over claims for damages "for injury or loss of property, or personal injury or death" caused by the negligence of government employees. Petitioner's claim plainly does not come within these provisions.

While asserting negligence, petitioner did not allege (let alone seek recovery for) injury to, or loss of, any of its property. Rather, the gravamen of the complaint was that, as a result of the asserted negligence, public firemen in the employ of petitioner were called upon to extinguish a fire. What was sought to be recovered was simply the expenses which petitioner purportedly incurred by reason of the activities of these firemen. For a basis of entitlement to such recovery, the complaint points to Sections 13007-13009 of the California Health and Safety Code. In substance, these sections confer upon the state the right to demand reimbursement from a landowner of the expense of fighting a fire which, as a result of the negligence of the landowner, spreads beyond the boundaries of his land. This reimbursement is not dependent to any extent upon the fire's

endangering or damaging, property owned by the State. Negligence, coupled with the fire's extending beyond the landowner's domain, is enough.

Contrary to petitioner's apparent view, the limitations upon the waiver of immunity contained in Section 1346(b) must be given effect irrespective of the provisions of local law. It is only after it has been determined that the claim is otherwise encompassed by the waiver that there is occasion for inquiry into the liability of a private defendant in like circumstances "in accordance with the law of the place where the act or omission occurred." For example, in *Dalehite* v. *United States*, 346 U.S. 15, this Court held that the jurisdictional requirement in Section 1346(b) that the claim be founded on "a negligent or wrongful act or omission" precludes recovery on a claim based on absolute liability. This holding was applied in *United States* v. *Ure*, 225 F. 2d 709 (C.A. 9) to reverse judgments against the United States based on absolute liability under state law. See also *United States* v. *Neustadt*, 366 U.S. 696.

Just as Congress could have subjected the United States to absolute liability, so too could it have provided that the United States should be responsible for any expenses incurred by reason of negligence of government employees. But it did not do so. The plain words of Section 1346(b) provide that it is only where the governmental negligence occasions injury to person or property that the Act may be looked to as a means of redress.

These considerations may explain why, as the court below noted (Pet. App. 15), the question raised by the petition is one of first impression. So far as we are aware, this case and a similar suit brought by the State of Oregon (see note 2, *supra*, p. 4) represent not only the first attempts to invoke the Tort Claims Act to recover the cost of performing a public service such as fire fighting, but also the first claims in the 16-year history of the Act which are not founded to any extent upon property damage or personal injury. This is so notwithstanding the fact that, as petitioner stresses (Pet. 6), half of the States have statutes which, like that of California, permit recovery of the costs of suppressing fires.

2. There is still an additional reason why the district court lacked jurisdiction over petitioner's claim. Even as a matter of California law, the claim was founded in contract and not in tort. Accordingly, it could not be cognizable under the Federal Tort Claims Act in any event and, being in excess of $10,000, was also beyond the Tucker Act jurisdiction of the district court. 28 U.S.C. 1346(a) (see p. 2, *supra*).

It is clear from the language of the California Health and Safety Code, on which petitioner's claim is based, that the right created by that statute has a contractual footing. Thus, Section 13009 provides that fire-fighting expenses "shall constitute *a debt* of" the person negligently causing the fire, collectible "in the same manner as in the case of *an obligation under a contract, expressed or implied*" (emphasis supplied; see p. 3, *supra*). Petitioner itself suc-

cessfully claimed that the rights created by the California fire-suppression-cost statute sound in contract in *People* v. *Zegras*, 165 P. 2d 541 (Dist. Ct. App.), affirmed on other grounds, 29 Cal. 2d 67, 172 P. 2d 883.[3] Speaking of the obligation to pay such costs, the court said (165 P. 2d at 543):

> That statutory obligation is quasi ex contractu. * * * It is a civil liability for a debt growing out of the breach of an implied contract to exercise due care to regulate and control fires negligently started or permitted by individuals to spread to other lands.

Accordingly, no action on the basis of this statute could be brought under the Federal Tort Claims Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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JANUARY 1963.

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[3] The statute involved in the *Zegras* case was the predecessor of the present statute but is for all relevant purposes the same. It is set forth at Pet. App. 24-25.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 666

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The comments made in the brief for the Government concerning the applicability of the Tucker Act to the plaintiff's cause of action for fire suppression costs requires a brief reply.

STATUTES INVOLVED

Section 1346, Title 28, U.S.C., provides in part:

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

"(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

* * * * *

Section 13009 of the California Health and Safety Code provides:

"The expenses of fighting any fires mentioned in Sections 13007 and 13008 are a charge against any person made liable by those sections for damages caused by such fires. Such charge shall constitute a debt of such person, and is collectible by the person, or by the federal, state, county, or private agency, incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied."

ARGUMENT

I. If the Dismissal of Plaintiff's Claim for Fire Suppression Expenses Is Grounded on the Applicability of the Tucker Act, Then a New and Important Conflict and Federal Question Is Presented

In its brief in opposition to petition for writ of certiorari, the government argued that, in any event, the plaintiff's claim for fire suppression costs under Health and Safety Code Section 13009 could not be cognizable under the Federal Tort Claims Act because such a claim is founded in contract rather than in tort. Hence, argues the government, since the amount of the claim exceeds $10,000, it is also beyond the Tucker Act jurisdiction of the district court (Br. in Opp., p. 7).

The court below ruled in the alternative in affirming the dismissal of the plaintiff's claim for fire suppression costs. It stated (Pet., Appendix A, p. 17):

> "* * * But whether the action is founded in tort or in contract the district court had no jurisdiction in either case, for if in tort the complaint does not claim an 'injury or loss of property;' and if on contract the action is beyond the jurisidictional limit of the court."

Of course, if the claim is governed by the aforementioned provisions of the Tucker Act, there is no question but that it is not within the jurisdiction of the district court since the amount of the claim ex-

ceeds the jurisdictional limit of $10,000 of the district court under that Act (28 U.S.C. 1346(a)(2)). However, in holding that the plaintiff's claim was not within the jurisdiction of the district court under the Tort Claims Act, the court found it unnecessary to decide whether the claim was governed by the Tucker Act since under the latter act the claim could not be maintained in the district court in any event because it exceeds $10,000.

If, as the government suggests, the judgment of the Court of Appeals for the Ninth Circuit is based on a holding that the plaintiff's claim is governed by the Tucker Act limiting jurisdiction of district courts to claims, not exceeding $10,000, "upon any express or implied contract" (28 U.S.C. 1346(a)(2)), then a new and possibly more important conflict is presented. This conflict exists with the Court of Appeals for the Second Circuit which has held[1] that the "implied" contracts referred to in 28 U.S.C. 1346(a)(2) are implied in fact contracts as opposed to implied in law contracts. The complaint herein alleges no contract, either express or implied in fact (R. 3-6). It alleges simply and directly the negligence of employees of the United States and the existence of an uncontrolled fire and incurring of expenses to extinguish such fire as a proximate result of this negligence (R. 4-6). The only grounds for holding that the jurisdictional limitations of the Tucker Act apply in this

[1] *Alliance Assurance Company v. United States* (C.A.2) 252 F.2d 529, 532.

case is that the claim is founded on an implied in law contract. Such a holding constitutes a substantial departure from the established construction of the Tucker Act and presents an important federal question which should be settled by this court.

II. The Zegras Case Does Not Hold That the Statutory Obligation for Fire Suppression Costs Is Founded in Contract

In its effort to bring the plaintiff's claim within the aforementioned provisions of the Tucker Act the government cites *People* v. *Zegras*, 165 P.2d 541 (Dist. Ct. App.) and quotes language therefrom to the effect that the statutory obligation for fire costs under California law is a claim founded on a contract. The case cited by the government is not authority for any such proposition.

The language and decision in the *Zegras* case to which the government refers and from which it quotes was the opinion rendered by the Third District Court of Appeal which was *vacated* by the decision and opinion of the California Supreme Court in the same case in *People* v. *Zegras*, 29 Cal.2d 67, 172 P.2d 883. In that case an action was brought by the State of California to recover fire suppression costs under the statutory predecessor of Section 13009, Health and Safety Code. That action was brought in the county where the fire occurred. The appeal was taken by defendant from an order denying defendant's motion for a change of place of trial to his county of

residence. After the court of appeal affirmed the order of the trial court, defendant appealed to the California Supreme Court. That appeal was granted and the case was transferred to the Supreme Court. On this transfer the opinion and decision of the district court of appeal from which the Government quotes ceased to be authority in the case and in any respect precedent under California law (*Ponce* v. *Marr*, 47 Cal.2d 159, 161, 301 P.2d 837). As the California Supreme Court said in *Ponce* v. *Marr*, *supra*, at 47 Cal.2d 161:

> "The emphasized language in the foregoing quotation is not a correct statement of the law and, if allowed to stand, would result in confusion with reference to the subject. It therefore seems necessary to reiterate that the effect of an order of transfer to this court is to remove the cause in its entirety from the District Court of Appeal. Thereafter it is pending in this court the same as if originally lodged here. . . . Again it was stated in *Knowse* v. *City Council*, 8 Cal.2d 482, at page 483 [66 P.2d 438]: 'The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. . . . [W]ithout some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written.' . . . ."

Hence, any statements of law in the district court of appeal's opinion in the *Zegras* case should not be given effect of precedent in construing Section 13009 of the Health and Safety Code.

Morever, the California Supreme Court in the *Zegras* case rejected the quoted language of the district court of appeal decision in unequivocal terms (29 Cal.2d pp. 68-69):

> " . . . . In enacting the statute upon which the present action is based, it directed that the expenses incurred in fighting fire ' . . . shall be collectible . . . in the same manner as in the case of an obligation under a contract, expressed or implied.' By this language, the enactment makes applicable to such an action the procedure governing a suit upon a contract, express or implied. It is immaterial, therefore, whether the statutory obligation for the expense of extinguishing a fire is classified as one sounding in tort, or a quasi contract, or a liability in the nature of a penalty; the Legislature has fixed the amount that may be recovered under specified conditions and made applicable the procedure for suit upon a contract."

The court could scarcely have more clearly disaffirmed the language of the district court of appeal holding that the statutory claim for fire suppression costs is founded on a contract.

CONCLUSION

For the foregoing reasons, this petition for a writ of mandate should be granted.

Respectfully submitted,

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